

Commonwealth of Massachusetts

Appeals Court

No. 2014-P-1743

ON APPEAL FROM MIDDLESEX SUPERIOR COURT

Sandro Turra

PLAINTIFF/APPELLANT

v.

Defendant Deutsche Bank Trust Company Americas, as Trustee for
RALI 2007QS7 c/o GMAC Mortgage

DEFENDANT/APPELLEE

Gislaynè Turra

DEFENDANT

BRIEF FOR APPELLANT

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ISSUE PRESENTED

Whether the Trial Court erred in holding that a mortgagor may not challenge the validity of a non-judicial foreclosure based on a foreclosing entity's failure to strictly comply with G.L. c. 244, § 15A.

STATEMENT OF THE CASE²

This is an appeal from a Middlesex Superior Court case brought to challenge the validity of a non-judicial foreclosure sale. On May 15, 2013, Sandro Turra ("Turra"), a resident of Everett Massachusetts, filed a Superior Court lawsuit against Deutsche Bank Trust Company Americas, as Trustee for RALI 2007QS7 c/o GMAC Mortgage LLC ("Deutsche Bank"), alleging that the non-judicial foreclosure that Deutsche Bank claimed to have performed against his home was void.³ (App. 3). On December 19, 2013, Turra amended his lawsuit and added

²For the convenience of the Court, Appellant has included a CD-ROM with PDF copies of his brief and appendix. These PDFs have bookmarks to the different sections of Appellant's brief and appendix.

³Deutsche Bank had filed a summary process case against Turra in April 2013 in Malden District Court, alleging that it was entitled to possession of Turra's home on the basis of a lawful foreclosure. (App. 56). On June 7, 2013, the Superior Court—pursuant to G.L. c. 223 § 2B—granted Turra's motion to transfer this summary process case into Superior Court and consolidate it with the Superior Court lawsuit. (App. 3).

in a claim regarding G.L. c. 244, § 15A—the claim that is the subject of this appeal. (App. 6). Turra alleged that the foreclosure against his home is void because the foreclosing entity failed to strictly comply with this foreclosure statute, which requires a foreclosing entity to timely notify the local municipality of the foreclosure within thirty days after the foreclosure sale. (App. 11).

Deutsche Bank filed a motion to dismiss Turra's lawsuit, for failure to state a claim upon which relief can be granted.⁴ (App. 58). On August 27, 2014, the Trial Court granted Deutsche Bank's motion to dismiss. (App. 286).

STATEMENT OF FACTS

On May 31, 2005, Sandro Turra ("Turra") purchased his home at 34 Jefferson Avenue, Everett, Massachusetts, which he later conveyed to himself and Gislayne Turra, his wife at the time, as tenants by the entirety. (App.

⁴ The Trial Court granted the parties' joint motion to submit supplemental memorandums of law following the Supreme Judicial Court's decision in U.S. Bank Nat'l Ass'n v. Schumacher. (App. 4). Moreover, following the hearing on Deutsche Bank's motion to dismiss, the Trial Court permitted Deutsche Bank to submit its motion with supplemental, persuasive authority. Id. Copies of all of these filings are included in the Appendix.

7). To purchase their home, Turra and Gislayne Turra granted a mortgage to Mortgage Electronic Registration Systems Inc. ("MERS") as mortgagee and Homecomings Financial LLC as lender. (App. 7-8).

On or around 2009, Turra and Gislayne Turra had trouble paying their mortgage loan as a result of the poor economy. (App. 8). They applied for a modification of their loan, which was unsuccessful, and eventually defaulted on the loan. Id.

On August 12, 2010, MERS assigned Turra and Gislayne Turra's mortgage to Defendant Deutsche Bank. Id. On November 8, 2010, GMAC Mortgage sent Turra and Gislayne Turra notices informing them that they were in default on their mortgage loan and offering them an opportunity to cure the default prior to foreclosure. Id. In 2011, Turra and Gislayne Turra divorced. Id. Gislayne Turra no longer resides in the home. Id.

Deutsche Bank filed a Servicemembers Civil Relief Act case against Turra and Gislayne Turra in the Massachusetts Land Court on May 2, 2011.⁵ Id. On

⁵A servicemembers' case is typically brought by a mortgagee prior to a non-judicial foreclosure, to determine if the mortgagor is part of the military and entitled to the benefits of the federal Servicemembers Civil Relief Act, which prohibits foreclosure against active members of the armed services. HSBC Bank USA v. Matt, 464 Mass. 193, 201 (2013).

September 13, 2011, the Massachusetts Land Court issued a judgment that Plaintiff and Defendant Turra were not entitled to the benefits of the Servicemembers Civil Relief Act, allowing Deutsche Bank to commence the foreclosure. Id. Deutsche Bank purported to have performed a non-judicial foreclosure against Turra and Gislayne Turra in 2011. (App. 9).

Turra filed this lawsuit against Deutsche Bank in May 2013, and later amended the complaint pursuant to Massachusetts Rules of Civil Procedure 15(a). (App. 6). Turra alleged that the purported foreclosure against his home was unlawful due to Deutsche Bank's failure to comply with Massachusetts foreclosure law. Id. Turra alleged that Deutsche Bank—the alleged foreclosing entity of his home—failed to strictly comply with G.L. c. 244, § 15A. (App. 11). This statute required Deutsche Bank, within thirty days of the foreclosure sale, to notify "all residential tenants of said premises, and the office of the assessor or collector of taxes of the municipality in which the premises are located and any persons, companies, districts, commissions or other entities of any kind which provide water or sewer service to the premises" of the foreclosure sale. G.L. c. 244, § 15A. Turra based this

allegation on a response to his public information request sent to the City of Everett, in which the City notified Turra that it received no notification from Deutsche Bank regarding the foreclosure sale of his home. (App. 271-72).

On August 27, 2014, the Court granted Deutsche Bank's motion to dismiss Turra's lawsuit for failure to state a claim upon which relief can be granted. (App. 286). On Turra's claim regarding G.L. c. 244, § 15A, the Court ruled:

While the plaintiff is correct that c. 244, § 15A is among the statutory sections which the Supreme Judicial Court has indicated regulate the mortgage holder's power of sale, see U.S. Nat 'I Ass 'n. V. Ibanez, 458 Mass. 637, 646 (2011), I do not read the statute or Ibanez to mandate the voiding of a foreclosure sale based on the alleged failure to provide notice of the foreclosure within thirty days to the tax assessor or collector and to water and sewer providers.

(App. 285). Plaintiff timely appealed this decision.

(App. 287-88).

STANDARD OF REVIEW

An appellate court reviews the allowance of a motion to dismiss de novo, and accepts as true "all well-

pleaded facts in the complaint and favorable inferences drawn therefrom." Cook v. Patient Edu, LLC, 465 Mass. 548, 549 (2013). In reviewing a motion to dismiss, an appellate court "may consider the allegations in the complaint, items appearing in the record, and exhibits attached to the complaint." Melia v. Zenhire, Inc., 462 Mass. 164, 165-66 (2012). "[A] complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely may not be appropriate." Nader v. Citron, 372 Mass. 96, 104 (1977). "Doubt as to whether a particular claim is provable is not a proper basis to dismiss a plaintiff's complaint under rule 12(b)(6)." Gibbs Ford, Inc. v. United Truck Leasing Corp., 399 Mass. 8, 13 (1987).

SUMMARY OF ARGUMENT

This appeal is about the right of a homeowner to challenge a non-judicial foreclosure against his home by relying upon the defenses afforded to him from established caselaw in this important area of law. Here, Turra sought to challenge the foreclosure against his

home by alleging that Deutsche Bank failed to strictly comply with G.L. c. 244, § 15A—a statute that the Supreme Judicial Court included as a foreclosure requirement in **six** separate decisions. The Trial Court misinterpreted the Supreme Judicial Court's precedent in this area of law and as such, this Court should reverse the Trial Court's decision and remand the matter back to Superior Court.

ARGUMENT

I. A MORTGAGOR MAY CHALLENGE THE VALIDITY OF A NON-JUDICIAL FORECLOSURE ON THE BASIS OF A FORECLOSING ENTITY'S FAILURE TO STRICTLY COMPLY WITH THE STATUTES RELATING TO FORECLOSURE

A mortgagor may challenge the validity of a non-judicial foreclosure on the basis of a foreclosing entity's failure to strictly comply with the statutes relating to foreclosure. Wayne Inv. Corp. v. Abbott, 350 Mass. 775, 775 (1966). The Supreme Judicial Court in U.S. Bank Nat'l Ass'n v. Schumacher most recently discussed these statutory requirements for a non-judicial foreclosure. U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 429 (2014). In Schumacher, the Court rejected the inclusion of a pre-foreclosure

default notice requirement as a part of these requirements, by noting that "the issue presented by [the mortgagor] is not that the bank failed to acquire legal title to the property in strict accordance with the power of sale as set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C." Id. This decision, along with the Court's other cases in this area of law, reaffirms that a mortgagor may challenge the validity of a non-judicial foreclosure on the basis of a foreclosing entity's failure to comply with these statutory requirements.⁶

II. G.L. c. 244, § 15A IS ONE OF THE STATUTORY REQUIREMENTS FOR A NON-JUDICIAL FORECLOSURE

G.L. c. 244, § 15A is one of the statutory requirements for a non-judicial foreclosure. Here, the Supreme Judicial Court has held, in **six** separate

⁶ Turra challenged the validity of the foreclosure by seeking a declaratory judgment and quiet title causes of action against Deutsche Bank. (App. 9, 13). In Abate v. Freemont Inv. & Loan, the Supreme Judicial Court held that these were appropriate remedies for challenging the validity of a non-judicial foreclosure. Abate v. Freemont Inv. & Loan, 470 Mass. 821, 835 (2015) ("We are mindful that in Massachusetts, a nonjudicial foreclosure State, a mortgagee may foreclose without prior judicial intervention. As we have noted, however, a property owner has other, and perhaps more suitable, remedies available to him or her. See, e.g., G. L. c. 231A, §§ 1-9 (declaratory judgment); G. L. c. 240, §§ 6-10 (action to quiet title); Mass. R. Civ. P. 65, 365 Mass. 832 (1974) (injunction as remedy).").

decisions, that these statutes consist of G. L. c. 244, §§ 11-17C:

- U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 646 (2011): "Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRice mortgages, it includes by reference the power of sale set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C."
- Eaton v. Fed, Nat'l Mortgage Ass'n, 462 Mass. 569, 581 (2012): "In addition to G. L. c. 183, § 21, itself, the "statutes relating to the foreclosure of mortgages by the exercise of a power of sale," *id.*, are set out in G. L. c. 244, §§ 11-17C."
- U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 429 (2014): "[T]he issue presented by Schumacher is not that the bank failed to acquire legal title to the property in strict accordance with the power of sale as set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C."
- Easthampton Sav. Bank v. City of Springfield, 470 Mass. 284, 290 (2014): "General Laws c. 244 establishes three means by which the equity of redemption of a mortgage may be foreclosed. They are foreclosure (1) by action, G. L. c. 244, §§ 3-10; (2) by entry and possession, G. L. c. 244, §§ 1,2; or (3) by sale under the power of sale in a mortgage, G. L. c. 244, §§ 11-17C."
- Abate v. Freemont Inv. & Loan, 470 Mass. 821, 823-24 (2015): "On March 28, 2012, Deutsche Bank conducted a nonjudicial foreclosure auction in accordance with the statutory power of sale provision in the mortgage and the nonjudicial foreclosure process set forth in G. L. c. 244, §§ 11-17C."
- Pinti v. Emigrant Mortgage, SJC-11742, slip op. at 24 (2015): "[T]here is a well established set of statutes relating to mortgage

foreclosures effected pursuant to a power of sale: § 21 and G. L. c. 244, §§ 11-17C."

Of these decisions, Schumacher is most relevant. In Schumacher, a mortgagor challenged a non-judicial foreclosure on the basis that the foreclosing entity failed to strictly comply with G.L. c. 244, § 35A, which requires mortgagees to provide mortgagors with a right to cure a loan default prior to foreclosure. Schumacher, 467 Mass. at 426-27. In Schumacher, the Supreme Judicial Court answered an important question regarding Massachusetts foreclosure law: what are the specific statutes that a foreclosing entity must strictly comply with to do a valid non-judicial foreclosure?

The Supreme Judicial Court decided that G.L. c. 244, § 35A was not part of the foreclosure process and explicitly stated the foreclosure statutes that **do** makeup the non-judicial foreclosure process: G. L. c. 244, §§ 11-17C. Id. at 429 ("Here, the issue presented by Schumacher is not that the bank failed to acquire legal title to the property in strict accordance with the power of sale as set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C."). For this reason, Schumacher is directly on point for this matter; here, the Supreme Judicial Court in Schumacher

decided the specific statutes required for a non-judicial foreclosure.⁷ See also id. at 432 (Gants, J., concurring) ("Where a defendant in the summary process action claims that the mortgage holder failed strictly to adhere to the requirements under the statutory power of sale set forth in G. L. c. 183, § 21, and the related requirements in G. L. c. 244, §§ 11-17C, proof of **any** violation of these requirements will void the foreclosure sale and, therefore, defeat the eviction.") (emphasis added).⁸

⁷Unlike Schumacher, Turra challenged the validity of his foreclosure in Superior Court, and moved to have his pending summary process transferred and consolidated with this civil action, pursuant to G.L. c. 223 § 2B ("Whenever cross actions between the same parties or two or more actions, including for the purposes hereof other court proceedings, arising out of or connected with the same accident, event or transaction are pending, one or more in the superior court and also one or more in one or more district courts, the superior court, upon motion of any party to any of such actions, may order that the action or actions pending in the district court or courts, with all the papers relating thereto, be transferred to the superior court . . ."). This difference, however, is immaterial for determining the sufficiency of Turra's cause of action; nothing in Schumacher limits a mortgagor to only challenging a foreclosure only as a defense to a summary process proceeding. Moreover, as discussed above, the Supreme Judicial Court in Abate noted that declaratory judgments and quiet title—actions that Turra raised in this lawsuit—are appropriate means of challenging a foreclosure in a civil action. Abate, 470 Mass. at 835.

⁸ Schumacher's concurring opinion further clarified the defenses available for a homeowner claiming a violation of the right-to-cure notice statute. Schumacher, 467 Mass. at 432 (Gants, J., concurring). This cited portion of this opinion—stating that **any** violation of G. L. c. 244, §§ 11-17C would void the foreclosure sale—was adopted by the majority opinion. Id. at 429. This position, again, is consistent with the Court's prior decisions on this matter—each holding that G.L. c. 244, § 15A is among the non-judicial foreclosure requirements.

III. A FORECLOSING ENTITY MUST STRICTLY COMPLY WITH
G.L. c. 244, § 15A IN ORDER TO PERFORM A VALID NON-
JUDICIAL FORECLOSURE

A foreclosing entity must strictly comply with G.L. c. 244, § 15A in order to perform a valid non-judicial foreclosure. As a foreclosure statute, this law explicitly requires a foreclosing entity to properly notify the listed persons and entities following the foreclosure sale and, when read in harmony with the other foreclosure statutes, is an essential requirement of the non-judicial foreclosure process. Moreover, the Court should consider the established precedent in this area of law when interpreting this matter of law.

a. The Plain Meaning of G.L. c. 244, § 15A
Mandates That A Foreclosing Entity Provide
Notice To the Appropriate Entities Following
a Non-Judicial Foreclosure Sale

The plain meaning of G.L. c. 244, § 15A mandates that a foreclosing entity provide notice to the appropriate entities following a non-judicial foreclosure sale. "When statutory language is clear and unambiguous, the statute must be given its plain meaning." Turner v. Lewis, 434 Mass. 331, 333 (2001). G.L. c. 244, § 15A requires the following:

A mortgagee taking possession of mortgaged premises prior to foreclosure or a mortgagee conveying title to mortgaged premises pursuant to the provisions of this chapter **shall**, within thirty days of taking possession or conveying title, notify all residential tenants of said premises, and the office of the assessor or collector of taxes of the municipality in which the premises are located and any persons, companies, districts, commissions or other entities of any kind which provide water or sewer service to the premises, of said taking possession or conveying title.

G.L. c. 244, § 15A (emphasis added). The plain terms of this statute are clear: a mortgagee needs to provide this notice within thirty days of the foreclosure sale, and permits no exceptions to this requirement. Id. This statute, simply put, is a mandatory requirement for a non-judicial foreclosure and, when read in harmony with the other power of sale statutes, requires strict compliance for the foreclosure to be valid.

b. G.L. c. 244, § 15A is an Essential Part of the Non-Judicial Foreclosure Process

G.L. c. 244, § 15A is an essential part of the non-judicial foreclosure process. As discussed above, the

Supreme Judicial Court has included this statute as one of these requirements in every recent foreclosure law decision. As a power of sale requirement, a foreclosing entity must strictly comply with G.L. c 244, § 15A in order to do a valid foreclosure. U.S. Bank Nat'l Assn v. Schumacher, 467 Mass. 421, 432 (2014) (Cord, J., concurring) ("Where a defendant in the summary process action claims that the mortgage holder failed strictly to adhere to the requirements under the statutory power of sale set forth in G. L. c. 183, § 21, and the related requirements in G. L. c. 244, §§ 11-17C, proof of **any** violation of these requirements will void the foreclosure sale and, therefore, defeat the eviction.") (emphasis added). As such, the failure of Deutsche Bank to strictly comply with G.L. c. 244, § 15A would void the foreclosure. See PNS Properties v. Flores, Chelsea District Court, No. 1414SU00072 at 2 (Sept. 10, 2014) ("Plaintiff failed to produce any credible evidence that Chelsea Water and Sewer Services were provided notice of the foreclosure sale within thirty days of the foreclosure as required by M.G.L. Ch. 244, §15A . . . Therefore, Plaintiff does not have a superior right to possession of the property and judgment is entered for the Defendant."). (Add. 16). The Trial Court erred in

holding that neither the statute nor Ibanez requires that a foreclosure sale is void for non-compliance with G.L. c. 244, § 15A. (App. 285). Here, the Supreme Judicial Court has explicitly stated this—beginning in Ibanez and continuing with its most recent caselaw.⁹

G.L. c. 244, § 15A is an appropriate statute to be included among the non-judicial foreclosure requirements. These requirements do not merely consist of the foreclosure sale itself, but also pre-foreclosure and post-foreclosure requirements. G.L. c. 244, § 14 (“[N]o sale under such power shall be effectual to foreclose a mortgage, unless, **previous to such sale**, notice of the sale has been published once in each of 3 successive weeks . . .”) (emphasis added); G.L. c. 244, § 15 (“The person selling, or the attorney duly authorized by a writing or the legal guardian or conservator of such person, shall, **after the sale**, cause

⁹In Ibanez and Eaton, the Supreme Judicial Court upheld challenges to non-judicial foreclosures on the basis that the foreclosing entity was not the “mortgagee” under G.L. c. 244, § 14. Eaton, 462 Mass. at 584; Ibanez, 458 Mass. at 651. Each decision came from an interpretation of G.L. c. 244, § 14, which the Court noted was a power of sale statutory requirement, along with G. L. c. 244, §§ 11-17C. Eaton, 462 Mass. at 581; Ibanez, 458 Mass. at 646. Any holding that G.L. c. 244, § 15A is not part of the power of sale requirements is in direct contradiction of the holdings in these cases: if a mortgagor cannot raise G.L. c. 244, § 15A as a defense to a foreclosure, it should also not be able to raise a challenge based on G.L. c. 244, § 14; a scenario that would be in complete odds with Ibanez and Eaton.

a copy of the notice and his affidavit, fully and particularly stating his acts, or the acts of his principal or ward, to be recorded in the registry of deeds for the county or district where the land lies . . .") (emphasis added). Just as a non-judicial foreclosure requires notice **prior** to a foreclosure sale, it is appropriate that it also require notice **after** the foreclosure sale, particularly to the municipality where the property is located. G.L. c. 244, § 15A, in short, is a notice provision—similar to G.L. c. 244, § 14 and G.L. c. 244, § 15. For this reason, it is appropriately one of the non-judicial foreclosure statutes.

c. The Court Should Apply Stare Decisis in
Considering Turra's Claim Under G.L. c. 244,
§ 15A

The Court should apply stare decisis in considering Turra's claim under G.L. 244, § 15A. "Stare decisis is a salutary principle, because in most matters a settled rule on which reliance can be placed is of more importance than the precise form of the rule." Kabatchnick v. Hanover-Elm Bldg. Corp., 328 Mass. 341, 346-47 (1952). "[I]t nevertheless is vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration. Parties

should not be encouraged to seek reexamination of determined principles and speculate on a fluctuation of the law with every change in the expounders of it.” Mabardy v. McHugh, 202 Mass. 148, 152 (1909). Here, the Supreme Judicial Court, in wake of the recent foreclosure crisis that has forced courts to closely review Massachusetts foreclosure law, has extensively considered these matters and in **six** separate decisions, affirmed the statutes consisting of non-judicial foreclosure requirements. As such, this matter is settled law and the Court should not disrupt these holdings.

This is especially pertinent considering that the foreclosure crisis in Massachusetts—like the rest of the country—is far from over. See Jack Newsham, Mass. foreclosure starts rise; completions remain low in March, BOSTON GLOBE (May 5, 2015) (“Foreclosure proceedings were started against more than 1,100 Massachusetts homeowners in March, a sharp increase over last year and the highest monthly total since October 2012.”). The Supreme Judicial Court’s recent foreclosure law decisions have decided important matters on foreclosure law; namely, the specific requirements that a foreclosing entity must strictly comply with to

perform a valid non-judicial foreclosure. Both mortgagees and mortgagors have relied upon these decisions in conducting these procedures; matters that the Court warned are "powerful act[s] with significant consequences." Ibanez, 458 Mass. at 655 (Cordy, J., concurring). The Supreme Judicial Court's prior six decisions on this area of law were aimed at resolving any uncertainty in this area of law, and the Court should not disrupt the consistency of these decisions.

Turra's position requires little from mortgagees to show strict compliance with this statutory requirement. A foreclosing entity needs to simply show that it timely provided this required notice to the appropriate entities through some form of mailing or receipt confirmation. Moreover, a foreclosing entity can easily show its compliance with this requirement through an affidavit recorded in the land records—a solution that the Supreme Judicial Court offered for mortgagees to comply with the default notice required by the terms of the standard mortgage. Pinti at 31 ("[A] mortgagee remains free to execute and then record an affidavit of compliance with the notice provisions of paragraph 22 that includes a copy of the notice that was sent to the mortgagor . . ."). Here, where Deutsche Bank has offered

nothing to show that it provided this notice, and Turra has a plausible basis for believing that Deutsche Bank never complied with this statute through a response from the City itself, the established precedent in this area of law mandates that he be permitted to raise this foreclosure defense.

d. Only the Legislature Is Permitted to Remove
G.L. c. 244, § 15A as a Requirement for a Non-
Judicial Foreclosure

Only the Legislature is permitted to remove G.L. c. 244, § 15A as a requirement for a non-judicial foreclosure. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . ." Brogan v. United States, 522 U.S. 398, 408 (1998). Here, the Legislature passed G.L. c. 244, § 15A as a requirement for a non-judicial foreclosure, which explicitly requires a foreclosing entity to notify the listed entities in the statute within a specific timeframe of the foreclosure sale. Similar to G.L. c. 244, § 14, the Legislature included G.L. c. 244, § 15A as a notice provision for the non-judicial foreclosure process. As such, the Legislature—and the Legislature alone—is only

permitted to eliminate this statute as a non-judicial foreclosure requirement.

IV. TURRA DOES NOT NEED TO PLEAD ANY PREJUDICE FROM DEUTSCHE BANK'S FAILURE TO COMPLY WITH G.L. c. 244, § 15A TO STATE A VIABLE CLAIM

As one of the non-judicial foreclosure statutes, Turra does not need to plead any prejudice from Deutsche Bank's failure to comply with G.L. c. 244, § 15A to state a viable claim. A challenge to a non-judicial foreclosure for a foreclosing entity's failure to comply with the power of sale requirements does not require a showing of prejudice to the mortgagor. Support for this is found in landmark Supreme Judicial Court decisions on non-judicial foreclosures: U.S. Bank v. Ibanez and Eaton v. Federal National Mortgage Association, and well as the Court's recent decision in Pinti v. Emigrant Mortgage. In each case, the Supreme Judicial Court upheld the invalidation of the foreclosures without a finding that the defects in the foreclosure were prejudicial to the mortgagors.

In U.S. Bank v. Ibanez, the Supreme Judicial Court held that a foreclosing entity must hold the mortgage at the time of foreclosure. U.S. Bank v. Ibanez, 458 Mass.

637, 655 (2011). In the two foreclosures that were the subject of this case, the foreclosing entities were securitized trusts who, undeniably, acquired the mortgage loans of the properties to be foreclosed. Id. at 640-45. These entities, however, did not have record assignment of the mortgages at the time of foreclosure. Id. In holding that the foreclosures were void, the Supreme Judicial Court did not consider how these defects in the foreclosure process were prejudicial to the mortgagors. Such a showing would have been near impossible to prove: these were not cases where the foreclosing entities were unrelated third parties trying to do fraudulent foreclosures; these were cases where the foreclosing entities simply failed to complete their paperwork.

The Supreme Judicial Court, however, looked at the broader issue in these cases: the importance of ensuring that a non-judicial foreclosure is done correctly. See id. at 655 ("Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it.") (Cordy, J., concurring). If actual

prejudice was required to challenge a non-judicial foreclosure, it is doubtful the Supreme Judicial Court would have decided Ibanez the same way.

The Supreme Judicial Court used similar reasoning in Eaton v. Federal National Mortgage Association, where the Court held that a foreclosing entity needs to hold the promissory note prior to foreclosure. Eaton v. Federal National Mortgage Association, 462 Mass. 569, 583-84 (2012). Here, the foreclosing entity held the mortgagor's mortgage, but not promissory note. Id. at 572-73. The Supreme Judicial Court held the foreclosure to be invalid because Massachusetts law requires both at the time of foreclosure. Id. 583-84. Similar to Ibanez, the Supreme Judicial Court did not discuss how the foreclosing entity's failure to hold the promissory note was in anyway prejudicial to the mortgagor. Moreover, as it was undisputed that the homeowner owed a debt to someone, it is difficult to reason how the foreclosing entity's failure to hold the promissory note could be prejudicial. Like Ibanez, the Supreme Judicial held this foreclosure invalid, without a showing of prejudice to the mortgagor.

Ibanez and Eaton make this point clear: prejudice to a mortgagor is not required in challenging a

foreclosure's validity. In both of these cases, the Supreme Judicial Court put public policy before the individual parties in considering the importance of strict compliance for non-judicial foreclosures.¹⁰

V. G.L. c. 244, § 15A SERVES AN IMPORTANT POLICY PURPOSE RELATED TO NON-JUDICIAL FORECLOSURES

G.L. c. 244, § 15A serves an important policy purpose related to non-judicial foreclosures. This statute is not a mere formality but rather an important law that addresses the impact of local municipalities from non-judicial foreclosures. In a non-judicial foreclosure, ownership of property changes without a judicial procedure that would put other affected parties—including local municipalities—on notice about these proceedings. The impact of foreclosures on local municipalities is substantial; a point that the Supreme Judicial Court recognized in Easthampton Sav. Bank v. City of Springfield, which determined the validity of municipal ordinances addressing non-judicial foreclosure. Easthampton Sav. Bank, 470 Mass. at 299

¹⁰Moreover, the Supreme Judicial Court reaffirmed this in its recent Pinti v. Emigrant Mortgage decision, holding that a foreclosure was void for failure to comply with one of the terms of the mortgage, despite no prejudice to the mortgagors from this defect. Pinti v. Emigrant Bank, SJC-11742, slip. op. (2015).


("We recognize that the city of Springfield has attempted to address the serious problem of urban blight within its borders through these ordinances."). See also Erik Eckholm, Foreclosures Force Suburbs to Fight Blight, N.Y. TIMES, Mar. 23, 2007 (discussing the impact of foreclosures on city suburbs); Dan Immergluck & Geoff Smith, The Impact of Single-family Mortgage Foreclosures on Neighborhood Crime, 21 HOUSING STUDIES 6 at 853 (2006) ("[T]he economic and social costs of foreclosures may affect more than the families most directly involved. Foreclosures can have implications for surrounding neighborhoods and even for their larger communities. Cities, counties and school districts may lose tax revenue from abandoned homes . . . Moreover, these figures do not account for all of the social and psychic costs of foreclosures, either to the family or the community.").

G.L. c. 244, § 15A addresses this public policy concern by requiring mortgagees who take possession of property after foreclosure to promptly notify the municipality where the property is located. As such, this statute is an important part of the non-judicial foreclosure process and a reason why it is among the non-judicial foreclosure statutes.

CONCLUSION

For these reasons, the Court should reverse the judgment of dismissal and remand the matter to the Superior Court.


Respectfully Submitted,


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Date: July 31, 2015

CERTIFICATE OF COMPLIANCE

I, Adam T. Sherwin, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).


Adam T. Sherwin, Esq.

CERTIFICATE OF SERVICE

I, Adam T. Sherwin, hereby certify that on this 31st day of July 2015, served a copy of Appellant's Brief via First Class Mail to the Counsel for Appellee.

Adam R

Adam T. Sherwin, Esq.

Addendum



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**PART II** REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS**TITLE I** TITLE TO REAL PROPERTY**CHAPTER 183** ALIENATION OF LAND**Section 21** "Statutory power of sale" in mortgage

Section 21. The following "power" shall be known as the "Statutory Power of Sale", and may be incorporated in any mortgage by reference:

(POWER.)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

**PART III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**TITLE II** ACTIONS AND PROCEEDINGS THEREIN**CHAPTER 223** COMMENCEMENT OF ACTIONS, SERVICE OF PROCESS

Section 2B Actions arising out of same accident or transaction pending in both superior and district courts; transfer to superior court

Section 2B. Whenever cross actions between the same parties or two or more actions, including for the purposes hereof other court proceedings, arising out of or connected with the same accident, event or transaction are pending, one or more in the superior court and also one or more in one or more district courts, the superior court, upon motion of any party to any of such actions, may order that the action or actions pending in the district court or courts, with all the papers relating thereto, be transferred to the superior court without the payment of any entry fee, or, with the consent of all principal parties to all such actions, may order that such actions be transferred without the payment of any entry fee to a designated district court in which any of such actions is pending.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**TITLE II** ACTIONS AND PROCEEDINGS THEREIN**CHAPTER 231A** PROCEDURE FOR DECLARATORY JUDGMENTS**Section 8** Necessary parties; class actions

Section 8. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or by-law or of a franchise, license, easement or other privilege granted by the commonwealth or a municipality thereof, the municipality, or the agency granting the privilege, as the case may be, shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

Nothing set forth in this section shall bar the bringing of a class action for declaratory relief pursuant to the new rules of civil procedure.

Following entry of a final decree or order favorable to the petitioner or petitioners in a class suit, any member of said class thereafter aggrieved by any violation of said order or decree shall be entitled to compel compliance therewith by instituting contempt proceedings in said class suit.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**TITLE III** REMEDIES RELATING TO REAL PROPERTY**CHAPTER 244** FORECLOSURE AND REDEMPTION OF MORTGAGES**Section 14** Foreclosure under power of sale; procedure; notice; form

Section 14. The mortgagee or person having estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, perform all acts authorized or required by the power of sale; provided, however, that no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once in each of 3 successive weeks, the first publication of which shall be not less than 21 days before the day of sale, in a newspaper published in the city or town where the land lies or in a newspaper with general circulation in the city or town where the land lies and notice of the sale has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on the deed or on the petition for probate by which the owner or owners acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent for the last preceding 3 years, then mailed by registered mail to the address of any of the parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by mail to such person under this section and such waiver shall constitute compliance with such notice requirement for all purposes. If no newspaper is published in such city or town, or if there is no newspaper with general circulation in the city or town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such city,

town or county, and having a circulation in that city, town or county, shall be sufficient for the purposes of this section. ^{Add. 5}

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing in this section shall be construed to prevent the use of other forms.

(Form.)MORTGAGEE'S SALE OF REAL ESTATE.

By virtue and in execution of the Power of Sale contained in a certain mortgage given by.....
to..... dated..... and recorded with

.....
Deeds, Book....., page....., of which mortgage the undersigned is the present
holder,.....

(If by assignment, or in any fiduciary capacity, give reference.)

.....
for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be
sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D. (insert
year),..... (place)..... all and singular the premises described in said mortgage,

(In case of partial releases, state exceptions.)

To wit: "(Description as in the mortgage, including all references to title, restrictions,
encumbrances, etc., as made in the mortgage.)"

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time
and place of the sale, and the time or times for payment of the balance or the whole as the case
may be.)

Other terms to be announced at the sale.

(Signed) _____

Present holder of said mortgage.____

A notice of sale in the above form, published in accordance with the power in the mortgage and
with this chapter, together with such other or further notice, if any, as is required by the
mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have
been sold and the deed thereunder shall convey the premises, subject to and with the benefit of
all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes,
assessments, liens or claims in the nature of liens, and existing encumbrances of record created
prior to the mortgage, whether or not reference to such restrictions, easements, improvements,

liens or encumbrances is made in the deed; provided, however, that no purchaser at the sale shall be bound to complete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of sale, which are not stated at the sale and included in the auctioneer's contract with the purchaser.

For purposes of this section and section 21 of chapter 183, in the event a mortgagee holds a mortgage pursuant to an assignment, no notice under this section shall be valid unless (i) at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds for the county or district where the land lies and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section. The notice shall not be defective if any holder within the chain of assignments either changed its name or merged into another entity during the time it was the mortgage holder; provided, that recited within the body of the notice is the fact of any merger, consolidation, amendment, conversion or acquisition of assets causing the change in name or identity, the recital of which shall be conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith on such recital.

**PART III** COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**TITLE III** REMEDIES RELATING TO REAL PROPERTY**CHAPTER 244** FORECLOSURE AND REDEMPTION OF MORTGAGES**Section 15** Copy of notice; affidavit; recording; evidence

Section 15. The person selling, or the attorney duly authorized by a writing or the legal guardian or conservator of such person, shall, after the sale, cause a copy of the notice and his affidavit, fully and particularly stating his acts, or the acts of his principal or ward, to be recorded in the registry of deeds for the county or district where the land lies, with a note or reference thereto on the margin of the record of the mortgage deed, if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and of the statute have in all respects been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**TITLE III** REMEDIES RELATING TO REAL PROPERTY**CHAPTER 244** FORECLOSURE AND REDEMPTION OF MORTGAGES**Section 15A** Mortgagee taking possession or conveying title; notice

Section 15A. A mortgagee taking possession of mortgaged premises prior to foreclosure or a mortgagee conveying title to mortgaged premises pursuant to the provisions of this chapter shall, within thirty days of taking possession or conveying title, notify all residential tenants of said premises, and the office of the assessor or collector of taxes of the municipality in which the premises are located and any persons, companies, districts, commissions or other entities of any kind which provide water or sewer service to the premises, of said taking possession or conveying title.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES**TITLE III** REMEDIES RELATING TO REAL PROPERTY**CHAPTER 244** FORECLOSURE AND REDEMPTION OF MORTGAGES

Section 35A Right of residential real property mortgagor to cure a default; good faith effort to negotiate for commercially reasonable alternative to foreclosure; response from borrower; affidavit upon initiation of foreclosure proceedings; acceleration of maturity of balance prohibited; notice

[Text of section effective until January 1, 2016. For text effective January 1, 2016, see below.]

Section 35A. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

“Borrower”, a mortgagor of a mortgage loan.

“Borrower’s representative”, an employee or contractor of a non-profit organization certified by Housing and Urban Development, an employee or contractor of a foreclosure education center pursuant to section 16 of chapter 206 of the acts of 2007 or an employee or contractor of a counseling agency receiving a Collaborative Seal of Approval from the Massachusetts Homeownership Collaborative administered by the Citizens’ Housing and Planning Association.

“Creditor”, a person or entity that holds or controls, partially, wholly, indirectly, directly, or in a nominee capacity, a mortgage loan securing a residential property, including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. “Creditor” shall also include any servant, employee or agent of a creditor.

“Creditor’s representative”, a person who has the authority to negotiate the terms of and modify a mortgage loan.

“Modified mortgage loan”, a mortgage modified from its original terms including, but not limited to, a loan modified pursuant to 1 of the following: (i) the Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program; (iii) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and recognized by the National Credit Union Administration, the Division of Banks or any other instrumentality of the commonwealth; (iv) the Federal Housing Agency; or (v) a similar federal refinance plan.

“Mortgage loan”, a loan to a natural person made primarily for personal, family or household

purposes secured wholly or partially by a mortgage on residential property.

"Net present value", the present net value of a residential property based on a calculation using 1 of the following: (i) the federal Home Affordable Modification Program Base Net Present Value Model, (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; or (iii) for the Massachusetts Housing Finance Agency's loan program used solely by the agency to compare the expected economic outcome of a loan with or without a loan modification.

"Residential property", real property located in the commonwealth having thereon a dwelling house with accommodations for 4 or less separate households and occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that residential property shall be limited to the principal residence of a person; provided further, that residential property shall not include an investment property or residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) A mortgagor of residential property shall have a 150-day right to cure a default of a required payment as provided in the residential mortgage or note secured by the residential property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of the mortgage; provided, however, that if a creditor certifies that: (i) it has engaged in a good faith effort to negotiate a commercially reasonable alternative to foreclosure as described in subsection (c); (ii) its good faith effort has involved at least 1 meeting, either in person or by telephone, between a creditor's representative and the borrower, the borrower's attorney or the borrower's representative; and (iii) after such meeting the borrower and the creditor were not successful in resolving their dispute, then the creditor may begin foreclosure proceedings after a right to cure period lasting 90 days. A borrower who fails to respond within 30 days to any mailed communications offering to negotiate a commercially reasonable alternative to foreclosure sent via certified and first class mail or similar service by a private carrier from the lender shall be deemed to have forfeited the right to a 150-day right to cure period and shall be subject to a right to cure period lasting 90 days. The right to cure a default of a required payment shall be granted once during any 3 year period, regardless of mortgage holder.

(c) For purposes of this section, a determination that a creditor has made a good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure shall mean that the creditor has considered: (i) an assessment of the borrower's current circumstances including, without limitation, the borrower's current income, debts and obligations; (ii) the net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure; and (iii) the interests of the creditor; provided, however, that nothing in this subsection shall be construed as prohibiting a creditor from considering other factors; provided, further, that the creditor shall provide by first class and certified mail or similar service by a private carrier to a borrower documentation of good faith effort 10 days prior to meeting, telephone conversation or a meeting pursuant to subsection (b).

(d) A borrower who receives a loan modification offer from the creditor resulting from the lender's good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure shall respond within 30 days of receipt of first class or certified mail. A borrower shall be presumed to have responded if the borrower provides: (i) confirmation of a facsimile transmission to the creditor; (ii) proof of delivery through the United States Postal Service or similar carrier; or (iii) record of telephone call to the creditor captured on a telephone bill or pin register. A borrower who fails to respond to the creditor's offer within 30 days of receipt of a loan modification offer shall be deemed to have forfeited the 150-day right to cure period and shall be subject to a right to cure period lasting 90 days.

(e) Nothing in this section shall prevent a creditor from offering or accepting alternatives to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such alternatives, rejects a loan modification offered pursuant to this subsection or does not qualify for a loan modification pursuant to this subsection.

(f) A creditor that chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days that engaged in a good faith effort to negotiate and agree upon a commercially reasonable alternative but was not successful in resolving the dispute shall certify compliance with this section in an affidavit. The affidavit shall include the time and place of the meeting, parties participating, relief offered to the borrower, a summary of the creditor's net present value analysis and applicable inputs of the analysis and certification that any modification or option offered complies with current federal law or policy. A creditor shall provide a copy of the affidavit to the homeowner and file a copy of the affidavit with the land court in advance of the foreclosure.

(g) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law until at least 150 days after the date a written notice is given by the mortgagee to the mortgagor; provided, however, that a creditor meeting the requirements of subsection (b) that chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days may accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law not less than 91 days after the date a written notice is given by the creditor to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail or similar service by a private carrier to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(h) The notice required in subsection (g) shall inform the mortgagor of the following: ^{Add. 12}—

- (1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;
- (2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 150 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made unless a creditor chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days that engaged in a good faith effort to negotiate and agree upon a commercially reasonable alternative but was not successful in resolving the dispute, in which case a foreclosure or other action to seize the home may take place on an earlier date to be specified;
- (3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;
- (4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;
- (5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property;
- (6) that the mortgagor may be eligible for assistance from the Homeownership Preservation Foundation or other foreclosure counseling agency, and the local or toll free telephone numbers the mortgagor may call to request this assistance;
- (7) that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage;
- (8) that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale;
- (9) that the mortgagor may be evicted from the home after a foreclosure sale; and
- (10) the mortgagor may have the following additional rights, depending on the terms of the residential mortgage: (i) to refinance the obligation by obtaining a loan which would fully repay the residential mortgage debtor; and (ii) to voluntarily grant a deed to the residential mortgage lender in lieu of foreclosure.

The notice shall also include a declaration, in the language the creditor has regularly used in its communication with the borrower, appearing on the first page of the notice stating: "This is an important notice concerning your right to live in your home. Have it translated at once."

The division of banks shall adopt regulations in accordance with this subsection.

(i) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 150-day notice to cure has ended.

(j) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(k) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

Chapter 244: Section 35A. Right of residential real property mortgagor to cure a default; notice required to accelerate maturity of balance; contents of notice; late fees; filing

[Text of section as amended by 2010, 258, Sec. 8 effective January 1, 2016. See 2010, 258, Sec. 14. For text effective until January 1, 2016, see above.]

Section 35A. (a) Any mortgagor of residential real property located in the commonwealth, shall have a 90-day right to cure a default of a required payment as provided in such residential mortgage or note secured by such residential real property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of such mortgage. The right to cure a default of a required payment shall be granted once during any 5-year period, regardless of the mortgage holder. For the purposes of this section, "residential property", shall mean real property located in the commonwealth having thereon a dwelling house with accommodations for 4 or less separate households and occupied, or to be occupied, in whole or in part by the mortgagor; provided, however, that residential property shall be limited to the principal residence of a person; provided further, that residential property shall not include an investment property or

residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (a) by any method authorized by this chapter or any other law until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail or similar service by a private carrier to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(c) The notice required in subsection (b) shall inform the mortgagor of the following:—

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property;

(6) that the mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the division of banks and the local or toll free telephone numbers the mortgagor may call to request this assistance;

(7) that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage;

(8) that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale;

(9) that the mortgagor may be evicted from the home after a foreclosure sale; and

(10) the mortgagor may have the following additional rights, depending on the terms of the residential mortgage: (i) to refinance the obligation by obtaining a loan which would fully repay the residential mortgage debtor; and (ii) to voluntarily grant a deed to the residential mortgage lender in lieu of foreclosure.

The notice shall also include a declaration, appearing on the first page of the notice stating: "This is an important notice concerning your right to live in your home. Have it translated at once."

The division of banks shall adopt regulations in accordance with this subsection.

(d) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 90 day notice to cure has ended.

(e) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(f) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

DISTRICT COURT DEPARTMENT
CHELSEA DIVISION
CIVIL NO. 1414SU00072

PNS PROPERTIES LLC
Plaintiff

v.

NELSON FLORES
Defendant

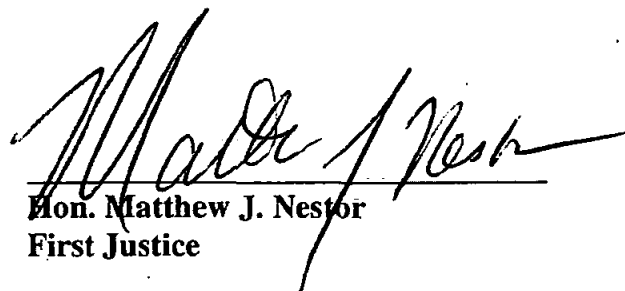
DECISION

1. Plaintiff purchased 21 Addison Street, Chelsea, MA at a foreclosure auction on September 12, 2013 for \$373,000.00.
2. The property is a three family home.
3. Plaintiff obtained all foreclosure documents in December, 2013. Those documents are included in Exhibits 1-10.
4. Plaintiff filed Exhibits 1-10 at the Suffolk County Registry of Deeds.
5. Plaintiff reached tenancy agreements with two of the three tenants who occupied the 21 Addison Street address prior to the foreclosure. These agreements were reached in January, 2014.
6. Defendant and Plaintiff failed to reach any agreement. Defendant has not paid any rent or use and occupancy payments.
7. In January 2014 plaintiff properly served defendant with a Notice to Quit and Summons and Complaint for Eviction.

8. Expert testimony buttressed Plaintiff's evidence that Exhibits 1-10 were legally sufficient to transfer title to 21 Addison Street to the Plaintiff.
9. Testimony substantiated that Affidavit of Sale was properly signed.
10. Plaintiff failed to produce any credible evidence that Chelsea Water and Sewer Services were provided notice of the foreclosure sale within thirty days of the foreclosure as required by M.G.L. Ch. 244, §15A.
11. Failure to strictly adhere to foreclosure requirements under the statutory power of sale under M.G. L. Ch. 183, §21 and the related requirements of M.G.L. Ch. 244, including but not limited to §15A, void the foreclosure sale. U.S. Bank National Association v. Schumaker, 467 Mass. 421, 432 2014 (Gants, J., concurring) "Where a defendant in the summary process action claims that the mortgage holder failed strictly to adhere to the requirements under the statutory power of sale set forth in G.L. c. 183, §21, and the related requirements in G.L. c. 244, §§11-17C, proof of *any* violation of these requirements will void the foreclosure sale and, therefore, defeat the eviction."
12. Therefore, Plaintiff does not have superior right to possession of the property and judgement is entered for the Defendant.

September 10, 2014

Date


Hon. Matthew J. Nestor
First Justice

Massachusetts Civil Procedure Rule 15: Amended and Supplemental Pleadings

[Disclaimer]

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (including an amendment changing a party) relates back to the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading it shall so order, specifying the time therefor.

Effective July 1, 1974.

Reporter's Notes

(1973) The first part of Rule 15(a) allows a party to amend his pleading prior to entry of an

order of dismissal, under certain circumstances, once, as a matter of course. The^{Add. 19} circumstances are: (1) the pleading is one with respect to which a responsive pleading is permitted (see Rule 7(a)) and no responsive pleading has yet been served; or (2) the pleading is one to which no responsive pleading is permitted (see Rule 7(a)) and the action has not yet been placed on the trial calendar. In the first case, no time limit is imposed; in the second, amendment must take place within 20 days after service of the original pleading.

Rule 15(a) is the same as Federal Rule 15(a) except that it also specifically limits the right of amendment as a matter of course to the situation where there has not been an order of dismissal.

Because a motion is not considered a pleading within the meaning of Rule 15 (see Rule 7(a)), Federal Rule 15(a) if read literally, would permit a plaintiff to amend his pleading, without leave of court, even after the Court had granted a motion to dismiss or a motion for summary judgment.

Most of the federal courts which have considered the matter have held that a motion is not a pleading within the meaning of Rule 15(a). Thus a mere filing of a motion to dismiss does not prevent the plaintiff from amending his complaint as a matter of right. See *Keene Lumber Co. v. Leventhal*, 165 F.2d 815 (1st Cir. 1948). It is however unclear whether the plaintiff should be entitled to amend his complaint as a matter of right after a motion to dismiss or a motion for summary judgment has been granted. The Court in *Keene Lumber Co.* held that the plaintiff's right to amend as a matter of course ended with the granting of the motion to dismiss; so have most courts which have considered the matter. There are however enough contrary decisions to cause the matter to be handled by a specific provision in Rule 15(a). See *Breier v. Northern California Bowling Prop. Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963); *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957).

The right to amend as a matter of course should not extend beyond the granting of a motion to dismiss or a motion for summary judgment. Because the plaintiff, who has already had an opportunity to amend prior to the disposition of the motion, nonetheless chose to stand (unsuccessfully) on his original pleading, the defendant who successfully moved against such pleading should at the least be allowed to oppose the amendment. This does not burden the plaintiff unduly, since even if leave of court is made a requirement, such leave will be liberally granted. See *Moore*, Federal Practice § 15.07 [2], (2d ed. 1968). And even if leave to amend is not granted, the plaintiff may still move for relief under Rules 59(e) or 60(b). These rules contain time limits, while present post-dismissal practice under Rule 15(a) does not.

The second part of Rule 15(a) deals with amendments by leave of court or by written consent of the adverse party. Rule 15(a) specifically provides that "leave shall be freely given when justice so requires."

In *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the Court strongly reaffirmed this mandate.

Rule 15(a) clearly alters prior Massachusetts practice. Amendment as a matter of right did not exist in Massachusetts. See G.L. c. 231, §§ 51-56. Motions to amend were addressed to the

discretion of the trial judge. *Reilly v. Revere Racing Ass'n Inc.*, 349 Mass. 763, 208 N.E.2d 322 (1965). Thus an exception to the denial of a motion to amend merely raises the question of abuse of discretion by the trial judge. *Magaletta v. Millard*, 346 Mass. 591, 195 N.E.2d 324 (1964).

Under the interpretation of Federal Rule 15(a) in *Keene Lumber, supra*, the plaintiff has the right to one amendment, without leave of court, even though the defendant has filed a motion to dismiss the complaint.

Rule 15(a) changes Massachusetts law in another material respect. Under prior practice an amendment setting out new causes of action could not be allowed. *Boston Trust Funds Inc. v. Henderson*, 341 Mass. 730, 170 N.E.2d 318 (1960); *Beckwith v. Massachusetts Turnpike Authority*, 354 Mass. 766, 238 N.E.2d 364 (1968). No such limitation exists under Rule 15. Indeed, Rule 15(d) permits the court, on terms, to allow a party to serve a supplemental pleading setting out further transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Previously, Massachusetts law did not allow an amendment to a declaration attempting to introduce a cause of action that did not exist when the action was brought. *Sharpe v. Metropolitan Transit Authority*, 327 Mass. 171, 97 N.E.2d 399 (1951).

Rule 15(b), which tracks Federal Rule 15(b), does not significantly change Massachusetts procedure. Issues, to whose trial the parties expressly or impliedly consent, will, even if not raised by the pleadings, be treated in all respects as if they had been so raised. Although such amendment of the pleadings to conform to the evidence may be made at any time, failure to amend does not affect the result of the trial.

If a party objects at the trial to evidence on the ground that it is not within the issues made by the pleadings, Rule 15(b) enjoins the court freely to allow amendment unless the objecting party satisfies the court that admission of such evidence would prejudice his case on the merits. A continuance may be granted to the objecting party to meet the evidence.

This rule differs slightly from previous Massachusetts practice. Although language of Mass. G.L. c. 231, § 51("at any time before judgment") appears sufficiently broad to permit the trial judge to allow amendment during trial where an objection is made to the admission of certain evidence, the Court in *Lewis v. Russell*, 304 Mass. 41, 45, 22 N.E.2d 606, 608-609 (1939) held that defective pleading cannot be cured merely by reference to the plaintiff's evidence. But even in *Lewis, supra*, the Court concluded: "This decision does not affect the power of the Superior Court in its discretion to allow the defendant to amend her answer on motion filed before judgment if, under all of the circumstances, justice appears to require such amendment."

Rule 15(c) provides for the relation back of amendments whenever the claim or defense asserted arose out of the conduct, transaction or occurrence attempted to be set forth in the original pleading. This provision ties directly to the statute of limitations.

Under Federal Rule 15(c) an amendment changing the party against whom a claim is asserted may relate back (and thus preclude a statute of limitations defense) if the claim in

the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Massachusetts practice is more liberal than Federal Rule 15(c) in allowing amendments adding or substituting party defendants after expiration of the period of limitations. The Massachusetts rule is set out in detail in *Wadsworth v. Boston Gas Company*, 352 Mass. 86, 88-89, 223 N.E.2d 807, 809-810 (1967) in the following language:

"... It has often been said that the running of the statute of limitations is not a reason for denying an amendment and may furnish a reason for allowing it. *Johnson v. Carroll*, 272 Mass. 134, 138, 172 N.E. 85; *Peterson v. Cadogan*, 313 Mass. 133, 134, 46 N.E.2d 517, and cases cited. In general, the law in this Commonwealth with respect to amendments is more liberal than elsewhere, and cases from other jurisdictions are not in point. *Neszery v. Beard*, 226 Mass. 332, 334, 115 N.E. 420. See *Ideal Financing Assn. Inc. v. McPhail*, 320 Mass. 521, 523, 70 N.E.2d 311.

"There is ample authority for the proposition that where an action has been commenced before the statute of limitations has run, a plaintiff may be allowed to substitute one defendant for another after the statute of limitations has run against the proposed substitute defendant. *McLaughlin v. West End St. Ry.*, 186 Mass. 150, 151, 71 N.E. 317. *Genga v. Director Gen. of Railroads*, 243 Mass. 101, 104, 137 N.E. 637, and cases cited. After the amendment has been allowed and the defendant brought into court by due process, the substitution relates back to the date of the writ and makes the substituted defendant a party from that date. *Johnson v. Carroll*, 272 Mass. 134, 137, 172 N.E. 85. We discern no difference in principle between permitting a plaintiff to substitute a defendant and permitting a plaintiff to add a defendant. See *Cohen v. Levy*, 221 Mass. 336, 337, 108 N.E. 1074; *McPherson v. Boston Edison Co.*, 336 Mass. 94, 97, 142 N.E.2d 758. The effect in both cases is that a different defendant is called upon to defend the action. We hold, therefore, that the propriety of allowing the amendment in both cases is governed by the same rules."

For statutory requirements governing amendment of names in Superior Court divorce proceedings, see G.L. c. 208 § 10.

Rule 15(d) provides that the court, upon motion of a party, may allow the party to serve a supplemental pleading setting forth transactions, occurrences, or events postdating the pleading sought to be supplemented. This liberalizes Massachusetts law, which did not allow an amendment to sustain a new cause of action not intended when the writ was drawn. See *Church v. Boylston and Woodbury Cafe Co.*, 218 Mass. 231, 105 N.E. 883 (1914).

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